Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-193

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

DENNIS NEIL McFARLAND and
TERRY LOWELL MOORE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Patricia J. Boyle, Chief Appellate Attorney, and Thomas M. Khalil, Assistant Prosecuting Attorney and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on October 7, 1974.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals, Division I, is reported at 55 Mich App 678; 223 NW2d 302 (1974) and is appended as Appedix "A". The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on October 7, 1974. Application for Leave to Appeal by Petitioner was denied by the Michigan Supreme Court on April 15, 1975. The jurisdiction of this court is invoked under 28 USC Sec. 1257(3).

QUESTION PRESENTED

Whether the Fifth Amendment bars cross-examination of a defendant concerning his failure to offer arresting officers the exculpatory information testified to at trial?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

> arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

Respondents were jointly tried and convicted by jury verdict of the offense of Breaking and Entering an Occupied Dwelling with Intent to Commit Larceny contrary to MCLA 750.110; MSA 28.305; (R 267).[1]

At trial defendant Moore did not testify in his own behalf (R. 234); defendant McFarland, however, did testify in his own defense (R. 198-225).

On direct examination defendant McFarland testified that he was not involved in the crime in question. He stated that he was driving with one "Earl" when an object hit their car windshield and cracked it (R. 201). The respondents, said McFarland, believing that some youths had thrown a rock at them, pursued the suspected rock throwers and began fighting them. McFarland said that co-defendant Moore cut his foot in kicking out a window during the alleged scuffle. Since they were outnumbered, said McFarland, he and "Earl" and defendant Moore ultimately ran away with the youths chasing them. After losing their pur-

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[1] References prefaced by "R." refer to the pages of the trial transcript record.

suers, said McFarland, he and Moore walked to the Stables Bar where they ordered a drink.

McFarland said they were going to call a cab to get help for Moore whose foot was bleeding badly (R. 198-204).

McFarland then testified, in pertinent part, to the following:

> Q. What is the next thing you did?
>
> A. The next thing I did, I think I got my drink. I'm not sure if I did or not, and two officers walked in and one came in and asked if he could talk to me and if I had some identification.
>
> Q. Did you produce the identification?
>
> A. I gave my driver's license.
>
> Q. What did the officers say to you then?
>
> A. He said he wanted me to step out. He wanted to talk to me.
>
> Q. Did you step outside, or did you refuse him?
>
> A. No, I walked behind the officer and walked outside.
>
> Q. What happened when you got outside?
>
> A. He told us to turn around and got something outside of his pocket and started reading some things and put my hands against the wall and started frisking me, and the one started to say, "These are the ones. We got 'em for breaking and entering". Then they put my hands behind my back and handcuffed me, and off we went to a police car.
>
> Q. All right. Then after you got in the police car, then what happened?
>
> A. They were in front, and I was in the back with my hands cuffed behind me. We rode to the police station.

> Q. When you got to the police station, what happened?
>
> A. Well, they took me in to this room and through a garage, I guess, into a room there and set me down there. I waited there until the couple of policemen come out and started talking to me.
>
> Q. What did they talk to you about?
>
> A. I remember one of them getting out a card or sheet and started reading things. He asked if I understood what was said to me, and I said yes. He started asking if I was a heroin addict and asking to look at my arms. He asked if I had killed anybody and other stuff and that.
>
> Q. So, then what happened?
>
> A. Well, he said—I told him no, you know. I told him I wanted to talk to an attorney. He said you have the right not to say anything more. I said yes. (R. 205-206)

Thereafter on cross examination defendant McFarland was asked the following questions and gave the indicated responses:

> Q. You got in the bar and the phone was busy, as I remember your testimony; is that correct?
>
> A. Yes, sir.
>
> Q. And you're not sure whether you had enough time to drink it?
>
> A. I don't recall if I had the drink or not.
>
> Q. The officer came and took you outside?
>
> A. He wanted to talk to me.
>
> Q. Did you tell him about Terry's injury?
>
> A. As soon as I walked outside the door, he asked me to put my hands up against the wall and started reading stuff from a card.

Q. Were you arrested for breaking and entering?

A. The Sergeant said, "These are the boys that did the breaking and entering, and you're under arrest".

Q. What did you say?

A. Nothing.

Q. Nothing?

A. I was flabbergasted.

Q. Did you ever tell the police about Earl?

A. What do you mean, sir, about Earl?

Q. Did you ever mention Earl to the police?

A. I never had a chance. I went directly to the police station.

Q. Did the police officer talk to you at the police station?

A. Yes.

Q. What did you tell him?

A. He started asking if I was a heroin addict.

Q. What did you tell them?

A. After they were talking to me about the heroin, they said I had the right to be quiet and to get an attorney. I said I guess I should.

Q. You didn't tell them anything else?

A. Outside of my name and stuff. I mean—I was trying to cooperate.

Q. Did you tell them about a broken windshield?

A. No, I didn't.

Q. Did you tell them about a fight?

A. No, I did not. (R. 219-220)

The Michigan Court of Appeals, in a 2 to 1 opinion held that reversible error was committed by the prosecutor's cross examination *vis a vis* defendant McFarland's failure to tell the arresting officer about the matters he had testified to on direct examination. Such cross examination, the Michigan Appellate Court held, violated defendant McFarland's right against self-incrimination as guaranteed by the federal constitution, citing *People* v *Bobo,* 390 Mich 355; 212 NW 2d 190 (1973) (appended as Appendix "C").

The Michigan Court of Appeals reversed the jury-based convictions of both defendants despite the fact that defendant Moore did not take the witness stand and did not undergo the allegedly erroneous interrogation.

REASONS FOR GRANTING THE WRIT

This case presents the important question whether the federal constitution precludes the prosecution from cross examining a defendant concerning his failure to tell the arresting officers the information testified to on direct examination. The issue involved in this case is the same as that presented in *United States* v *Hale,* No. 74-364, decided June 23, 1975; 17 Cr. L 3094: In *Hale,* however, this Honorable Court did not reach the issue of whether the federal constitution prohibited such questioning. Decision was based, rather, on this court's supervisory powers over the federal judiciary. This case, then, presents the constitutional issue for resolution by this court.

In the instant case defendant McFarland attempted to portray to the jury that upon his arrest he had nothing to hide, that he was fully open and honest with the police, that he was "flabbergasted" at being arrested for breaking and entering, and that he was merely at the bar having a drink and was in no way connected with the crime (R. 204-206).

In order to place defendant's representations of his alleged honesty and openness, surprise and "flabbergasted" condition in their proper perspective and to test their validity by the only means available—cross-examination—the prosecutor propounded several queries aimed at doing just that (R. 219-220).

If the Michigan Court of Appeals opinion is allowed to stand, then every defendant need only make similar representations before a jury to get the intended benefit that accrues from such a posture and be secure in the knowledge that the prosecutor will be unable to interrogate him on the subject. Thus, a defendant could and would reap a benefit and sustain no burden in utilizing such a ploy since he no longer could be said to have opened the door to such inquiry given the Michigan holding that the Fifth amendment forbids such questioning.

Ironically, if the Michigan opinion is not overturned then a defendant could effectively close the proverbial door to cross-examination while creating an unimpeachably favorable impression to his defense.

This court should grant certiorari to review the question of whether as a matter of federal constitutional law a defendant is entitled to immunity from cross-examination regarding his failure to offer his self-serving courtroom statements to the police at the time of his arrest.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Court of Appeals should be reviewed by this Court and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

People v Terry Moore
People v McFarland

OPINION OF THE COURT

* * * * *

Before: V. J. Brennan, P.J., and R. B. Burns and R. L. Smith,* JJ.

R. B. Burns, J. Defendants were tried and convicted, jointly, of breaking and entering an occupied dwelling with intent to commit larceny. MCLA 750.110; MSA 28.-305.

They appeal and we reverse.

The prosecutor, while cross-examining defendant McFarland, adduced the following testimony:

> "Q. Were you arrested for breaking and entering?
> "A. The sergeant said, 'these are the boys that did the breaking and entering and you're under arrest'.
> "Q. What did you say?
> "A. Nothing.
> "Q. Nothing?
> "A. I was flabbergasted.
> "Q. Did you ever tell the police about Earl?
> "A. What do you mean, sir, about Earl?
> "Q. Did you ever mention Earl to the police?
> "A. I never had a chance. I went directly to the police station.

---

* Former circuit judge, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

"Q. Did the police officer talk to you at the police station?

"A. Yes.

"Q. What did you tell him?

"A. He started asking if I was a heroin addict.

"Q. What did you tell him?

"A. After they were talking to me about the heroin, they said I had the right to be quiet and to get an attorney. I said I guess I should.

"Q. You didn't tell them anything else?

"A. Outside of my name and stuff. I mean—I was trying to cooperate.

"Q. Did you tell them about a broken windshield?

"A. No, I didn't.

"Q. Did you tell them about a fight?

"A. No, I did not.

"Q. Were you perspiring or a little sweaty when the police arrested you, if you remember?

"A. I imagine I was. I'd walked quite far."

We think this testimony is the exact type of testimony prohibited in *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973).

Also, the trial court should not have allowed the prosecutor to conduct the irrelevant demonstration of opening a door with a credit card.

In addition, when instructing the jury, the trial court should keep in mind the distinction between inferring intent from an unlawful act and presuming intent from an unlawful act.

Reversed and remanded for a new trial.

R. L. Smith, Jr., concurred.

DISSENTING OPINION

V. J. Brennan, P. J. *(dissenting):* In this matter, the defendants were tried jointly and convicted of breaking and entering an occupied dwelling with intent to commit larceny. MCLA 750.110; MSA 28.305.

My colleagues have reversed this conviction by opinion.

I must respectfully dissent from my fellow judges in this case. My review of the record presents a different picture to me than that reached by my colleagues. Consequently a different application of the cited authority is, in my opinion, required.

My colleagues quote the prosecutor's cross-examination of defendant McFarland and use it as the main reason for the reversal, citing *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973), as authority. I too would concur if that testimony had been initiated by the prosecution. A careful review of the transcript, however, shows very clearly that this entire testimony was first brought out on direct examination by the defendant and his counsel, a practice frequently used as a matter of strategy so that the defendant rather than somebody else tells the story.

This gave the prosecutor the *right* to cross-examine in the same areas. I feel it is academic in trial practice that once the door is opened on direct examination those areas may be examined on cross, even though they may not otherwise have been admissible. *People v Roger Johnson,* 382 Mich 632; 172 NW2d 369 (1969); *People v Markham,* 19 Mich App 616; 173 NW2d 307 (1969); *lv den* 383 Mich 804 (1970). *Cf. LaForest v Grunow,* 43 Mich App 254; 204 NW2d 355 (1972).

On direct examination the defendant testified about the heroin question, about whether he had killed anybody,

about the broken windshield, about the fight, about Earl, about the police reading him his rights, about then telling him of his right to a lawyer, about his stating "no" as to whether he wanted to make a statement, and about his telling the police that he wanted a lawyer.

These are the exact areas upon which the prosecution examined him.

Supreme Court Justice Thomas Giles Kavanagh, in his well-written opinion in *Bobo, supra,* said on p 359: "In the present case on direct examination defendant gave no testimony whatsoever regarding any statement made to the police or anyone else."

The qualification clearly shows that had he given any testimony on direct examination regarding a statement, cross-examination in that area would have been admissible. Also, at the beginning of the opinion Justice Kavanagh framed the question as follows:

> "Where an accused exercises his constitutional right to remain silent at the time of the arrest, does the use of such silence against him at trial under the doctrine of impeachment by prior inconsistent statement constitute prejudicial error where he made no allegations on direct examination as to what was said or not said at the time of arrest?"

I point out again the qualification and restate the last part of that question: " * * * where he made no allegations on direct examination as to what was said or not said at the time of arrest?"

My colleagues have misapplied the mandate in *Bobo.*

As to the other issues, I have examined the instructions in their entirety and find that they fairly charge the jury on the law.

The demonstration of how the door was opened is permissible as being part of the prosecutor's explanation of his theory of entry. This is admissible testimony to a jury who must then determine what weight or credibility it shall give to it.

I find no error in this case. It should be affirmed.

APPENDIX "B"

ORDER DENYING LEAVE TO APPEAL

(State of Michigan—Supreme Court)

(Filed April 15, 1975)

CR 13-473
People of the State of Michigan,
Plaintiff-Appellant,
v 56401
Terry Lowell Moore and
Dennis Neil McFarland,
Defendants-Appellees.

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of April in the year of our Lord one thousand nine hundred and seventy-five.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice; Thomas M. Kavanagh, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same hereby is Denied, be-

cause appellant has failed to persuade the Court that the questions presented should be reviewed by this Court.

T. M. Kavanagh, J., not participating.

State of Michigan—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of April in the year of our Lord one thousand nine hundred and seventy-five.

/s/ Corbin R. Davis,
Deputy Clerk.

APPENDIX "C"

People v Bobo

OPINION OF THE COURT

• • • • •

T. G. Kavanagh, J. The defendant, Ned Ladd Bobo, was arrested on June 5, 1968, and convicted of entering without breaking with intent to commit larceny in violation of 1931 PA 328, § 111, as amended by 1964 PA 133, § 1; MCLA 750.111; MSA 28.306. On June 26, 1972, the Court of Appeals affirmed his conviction.

The question before us as posed by defendant is as follows:

> "Where an accused exercises his constitutional right to remain silent at the time of arrest, does the use of such silence against him at trial under the doctrine of impeachment by prior inconsistent statement constitute prejudicial error where he made no allegations on direct examination as to what was said or not said at the time of arrest?"

We answer in the affirmative.

When arrested by Detroit police officers Bobo exercised his constitutional right to remain silent[1] and made no statement.

At his trial when testifying on his own behalf Bobo stated on direct examination that just prior to his being arrested near the scene of the crime two men presumably

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[1] US Const, Am V; Const 1963, art 1, § 17.

potential suspects, ran past him from the general area of the crime.[2]

Bobo was not asked by his counsel and did not volunteer whether or not he made any statement to the police officers. However, the prosecutor over timely objection by defense counsel was permitted by the court to ask Bobo on cross-examination if he had, at the time of his interrogation told the officer about the two men who had run past him.[3]

The court also permitted the prosecutor to remark during his closing argument to the jury that Bobo had said nothing to the police about two men running past him.[4]

---

[2] "*Q.* What did you see with reference to anybody running down the street toward you?

"*A.* I didn't see nothing but two men running past me."

[3] "Q. Did you say anything to him [the questioning police officer] about two other men running on the street?

"A. He didn't ask me.

"Q. I said did you say anything to him?

"A. No, I didn't.

"Defense Counsel: Before you answer that question. I do object to it.

* * * * *

"Q. My last question to you was did you tell the officer about these two men running down the alley; your answer is no?

"A. I don't recall."

[4] "Prosecutor: Oh, yes, one of the defendants, yesterday said something about two other men. Two other men, as they were walking, mind you, from the other direction, from what had been previously testified to by three of the officers, they claim now were coming from the other direction and two phantoms, two men who they claim ran past them five or six feet past them ran down the alley. Yet within five or six feet Edison and Ned Bobo who claimed they saw these two men said nothing to the police.

"Defense Counsel: * * * If the Court please, at this point I move for a mistrial on behalf of Ned Ladd Bobo on the ground that the Prosecutor has violated that defendant's privilege against incrimina-

(*continued on next page*)

The prosecutor urges that we allow the prosecutor to impeach a defendant by questioning him about what was said or not said to the police at the time of arrest as part of the *res gestae* citing *People v Noble,* 23 Mich App 100, 101; 178 NW2d 118, 119 (1970), or as an inconsistent "nonutterance", citing *People v Calhoun,* 33 Mich App 141, 147; 189 NW2d 743, 746 (1971).

The use of a "nonutterance" as approved in *Calhoun* was analyzed and criticized by Justice Levin in his dissent in *People v McColor,* 36 Mich App 455, 458-465; 194 NW2d 99-103 (1971). We can add nothing to his analysis and criticism except our endorsement and the observation that *Calhoun* conflicts with and must be regarded as overruled by *People v Graham,* 386 Mich 452; 192 NW2d 255 (1971).

We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. "Nonutterances" are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did.

In *Graham, supra,* which was decided following the decision in *Harris v New York,* 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971), we permitted the prosecution to cross-examine the defendant with respect to his silence

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(*continued from preceding page*)

tion. The defendant Ned Ladd Bobo at the time of his interrogation by Detective Berryman with the gun pointed at him being questioned about a robbery had no duty whatsoever to speak to the detective about anything. And his failure to speak to that cannot be held against him. And I submit that I am intitled [*sic*] to a mistrial.

"The Court: I will deny the motion * * *."

at the time of arrest because the defendant testified on direct examination that he had repeatedly told the police at the time of arrest and while incarcerated that he wanted to explain the whole situation involved in his arrest.

In *Graham, supra,* 458, we stated:

> "In our holding today, we stress that the defendant's refusal to speak during interrogation is admissible only to impeach his own inconsistent statements at trial."

In the present case on direct examination defendant gave no testimony whatsoever regarding any statement made to the police or anyone else.

On appeal the parties properly drew no distinction from the circumstance that the "non-statement" was made to the questioning officer rather than the arresting officer. The prosecutor's counterstatement of questions involved is:

> "Whether the Court of Appeals erred in upholding the trial court's admission of evidence of *arrest silence* for impeachment?" (Emphasis supplied.)

Here the defendant might well have considered himself to be under arrest.

Officer Berryman testified that while off duty after completing his shift, he was driving near the scene of the crime here involved. He observed a holdup in progress from which some suspects fled. Because he was but a block away he circled around and saw two men running through an alley. One of the men was defendant Ned Ladd Bobo. Believing them to be the suspects he had seen fleeing the holdup he stopped them at gun point and identified himself as a police officer. He asked them for identification

and while he was checking their identification, Officer Selick came running up and two other officers came up in a car and Officer Selick placed the two men under arrest.

What concerned the parties and what prompted our grant of leave was the propriety of using the fact of defendant's silence either as evidence of guilt or for the purpose of impeachment.

Whether his silence was prior to or at the time of arrest makes little difference—the defendant's Fifth Amendment right to remain silent is constant.

In Michigan we have been committed to the doctrine since long before *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966) that even in the face of specific accusation of a crime that an accused's silence may not be used against him. In *People v Bigge,* 288 Mich 417; 285 NW 5 (1939), this Court said:

> "The time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt. There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt of a defendant is no confession of guilt on the part of a defendant. Defendant, if he heard the statement, was not morally or legally called upon to make denial or suffer his failure to do so to stand as evidence of his guilt."

If silence in the face of specific accusation may not be used, it would be a strange doctrine indeed that would permit silence absent such an accusation to be used as evidence of guilt.

It is unimportant whether the accuser be a police officer or not. Manifestly whenever a person is stopped for interrogation by the police, whether technically under arrest or not, the Fifth Amendment guarantees that his silence may not be used against him.

The prosecutor's reliance on *Noble, supra,* as authority for admitting evidence of defendant's silence as part of the *res gestae* seems misplaced. *Noble* held that a complainant's report of an assault after 12 hours could be considered as part of the *res gestae* of that crime, but it did not speak at all to the question of a defendant's silence.

In *People v Todaro,* 253 Mich 367; 235 NW 184 (1931) and on rehearing 256 Mich 427; 240 NW 90 (1932) a majority of the Court held that silence in the face of accusation by an unidentified accuser might be shown as part of the *res gestae* and such silence be regarded as acquiescence in the truth of the charge. We are persuaded that the reasoning of the dissenters in that case is more persuasive and in light of our conviction that such a doctrine is wholly at odds with the law defining our rights under the Fifth Amendment, overrule *Todaro.*

Borrowing from Justice Higbee in *State v Hogan,* 252 SW 387 (Mo, 1923), we quote his observation:

> "This humane rule has higher sanction than mere judicial precedent. At the trial of Jesus before the Sanhedrin, we read:
>
> " '59. Now the chief priests and elders, and all the council, sought false witness against Jesus, to put him to death;
>
> " '60. But found none; yea, though many false witnesses came, yet found they none. At the last came two false witnesses.

> " '61. And said, This fellow said I am able to destroy the temple of God, and to build it in three days.
>
> " '62. And the high priest arose, and said unto him, Answerest thou nothing? What is it which these witness against thee?
>
> " '63. But Jesus held his peace.' "
>
> —*Matthew 26:59-63.*
>
> "When he was before Pilate:
>
> " '11. And Jesus stood before the governor: and the governor asked him, saying, Art thou the King of the Jews? And Jesus said unto him, Thou sayest.
>
> " '12. And when he was accused of the chief priests and elders, he answered nothing.
>
> " '13. Then said Pilate unto him, Hearest thou not how many things they witness against thee?
>
> " '14. And he answered them never a word; insomuch that the governor marveled greatly.' "
>
> —*Matthew 27:11-14*

Reversed and remanded for new trial.

T. M. Kavanagh, C. J., and Williams and Levin, JJ., concurred with T. G. Kavanagh, J.

DISSENTING OPINION

T. E. Brennan, J. *(dissenting)*. I must dissent.

The difficulty with the majority decision is that it does not fit the facts of the case before us.

For emphasis, I have underlined quoted portions of the majority opinion in the following quotations:

> "The question before us as posed by defendant is as follows:
>
> "'Where an accused exercises his constitutional right to remain silent *at the time of arrest,* does the use of such silence against him at trial under the doctrine of impeachment by prior inconsistent statement constitute prejudicial error where he made no allegations on direct examination as to what was said or not said *at the time of arrest?*'
>
> * * * * *
>
> The prosecutor urges that we allow the prosecution to impeach a defendant by questioning him about what was said or not said to the police *at the time of arrest* as part of the *res gestae* citing *People v Noble,* 23 Mich App 100, 101; 178 NW2d 118, 119 (1970), or as an inconsistent 'nonutterance', citing *People v Calhoun,* 33 Mich App 141, 147; 189 NW2d 743, 746 (1971).
>
> * * * * *
>
> "We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent *in the face of accusation.* 'Nonutterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did."

These excerpts from the majority opinion demonstrate that the majority are of the mistaken view that the defendant in this case was under arrest and accused of burglary at the time of the alleged "nonutterance". In fact, the defendant was not under arrest at that time, nor had he been accused of anything.

The following is an excerpt from the testimony of the defendant upon direct examination:

> "Q. What did you see with reference to anybody running down the street toward you?
>
> "A. I didn't see nothing but two men running past me.
>
> "Q. Did they—had you reached the alley in the middle of the street when these men ran past you?
>
> "A. I believe I was past. As a matter of fact, I was.
>
> "Q. And how long was it after these men ran past you that you were stopped by the policemen?
>
> "A. It wasn't too long, a matter of moments, I believe.
>
> "Q. When you were stopped by the policemen, did you show them identification?
>
> "A. Yes, I did.
>
> "Q. And then what happened?
>
> "A. Well, after I got through identifying myself, he told me and Milton Edison what had happened and then—
>
> "Q. What did he say, what were the words that he used?
>
> "A. He said a man had been robbed. I had told him where I was and where I was going. And he let us go.
>
> "Q. Then what happened, if anything?

"A. Well, me and Milton Edison, we made our first steps and then another squad police car came and stopped us.

"Q. And did those police officers say anything to you?

"A. Those were officers who put us under arrest."

This testimony clearly shows, by defendant's own words, that the first officer who stopped him on the evening in question did not place him under arrest, nor did he accuse the defendant of burglary. This comports with the testimony of officer Berryman. He was not investigating a burglary. He had observed a holdup in progress a few moments before his encounter with the defendant. He was investigating a robbery. He told the defendant that a man had been robbed.

The cross-examination of the defendant upon the question of whether or not he informed Berryman of the "two men running", concludes as follows:

"Q. (By Mr. Stephens): You did indicate you did not tell the officer about these two men running, allegedly running down the street?

"A. What did I do?

"Q. You did not tell the officer who stopped you about these men running down the street?

"A. I don't remember.

"Q. Did you tell the officer they went down that alley?

"A. I don't recall.

"Q. Did you point down the alley?

"A. I don't recall.

"Q. Did you describe these men to the officers?

"A. I don't recall.

"Q. Did you get in the officer's car and go down the alley with him?

"A. No, I didn't.

"Q. Your testimony is that you took another step, you talked to the officer, and somebody else came up and arrested you; is that correct?

"A. I said I took more than a couple of steps. I said he let us go."

Again it is clear that the defendant was not under arrest at the time of his conversation with officer Berryman.

I cannot conceive that our Court really intends to extend the rule of *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966), to all cases where citizens engage in conversations of any kind with law enforcement personnel.

If every conversation between a policeman and a citizen on the street must begin with a recitation of the *Miranda* warnings then we may as well consign the whole matter of public safety to Divine Providence.

Certainly there could no longer be any meaningful, police-community relations, nor any effective citizen assistance to officers of the law.

Swainson and M. S. Coleman, JJ., concurred with T. E. Brennan, J.